

STATE OF DELAWARE

V.

DANIEL PEREZ,

Petitioner/Defendant.

Def. I.D. # 1807009079

Submitted: September 17, 2020

Decided: November 2, 2020

Upon Petitioner's Motion for Postconviction Relief (R-1)

DENIED

MEMORANDUM OPINION AND ORDER

Daniel Perez, James T. Vaughn Correctional Center, 1181 Paddock Road, Smyrna, DE 19977; Petitioner/Defendant.

Derek G. Gay, Deputy Attorney General, Department of Justice, 114 East Market Street, Georgetown, DE 19947; Attorney for State of Delaware.

KARSNITZ, J.

I. INTRODUCTION

On November 4, 2019, Daniel Perez (“Petitioner,” “Defendant,” or “Perez”) filed a timely Motion for Postconviction Relief (the “Initial Rule 61 Motion”) and a Motion for Appointment of Postconviction Counsel. The Initial Rule 61 Motion stated Grounds I, II and III for relief. On November 27, 2019, Petitioner filed an Amended Motion for Postconviction Relief (the “Amended Rule 61 Motion”). The Amended Rule 61 Motion amended Grounds II and III and added Grounds IV, V and VI. On September 17, 2020, Petitioner filed a Motion to Retract/Amend the Rule 61 Motion (the “Retracted/Amended Rule 61 Motion”). The Retracted/Amended Rule 61 Motion added Ground VII (the Initial Rule 61 Motion, the Amended Rule 61 Motion, and the Retracted/Amended Rule 61 Motion, collectively, the “Rule 61 Motion”). On October 9, 2020, I granted Petitioner’s Motion to Retract and Amend, denied his Motion for Appointment of Postconviction Counsel, and reserved ruling on the Rule 61 Motion. This is my ruling on the Rule 61 Motion.

II. BACKGROUND

On February 26, 2019, I accepted a guilty plea from Petitioner to two charges: Drug Dealing Tier 4 (Cocaine) and Drug Possession Tier 4 (Heroin). I held a full

and complete colloquy with Petitioner and Trial Counsel as to whether Petitioner was entering his plea knowingly, intelligently and voluntarily. Petitioner stated that he had reviewed the plea agreement and the truth-in-sentencing form with Trial Counsel, with whose representation he was satisfied, and that he understood the legal consequences of his guilty plea, including the waiver of certain constitutional rights.

Petitioner was originally sentenced on March 15, 2019. On December 10, 2019, a corrected sentencing Order was entered, as follows: on the Drug Dealing charge, 25 years of incarceration, after serving 3 years and 6 months at Level 5 balance of sentence suspended for 18 months at Level 3; on the Drug Possession charge, 15 years of incarceration at Level 5 with the balance of the sentence suspended for 18 months at Level 3, with Probation concurrent.¹

III. GROUNDS FOR RELIEF

Petitioner states seven grounds for postconviction relief, which I summarize as follows:

- I. Petitioner was not provided with a full record of all proceedings, including transcripts, videos and police reports.
- II. Trial Counsels' assistance was ineffective under the Sixth Amendment, as incorporated into the Fourteenth Amendment, to the United States Constitution, because of their failure to move to suppress evidence that was the result of an initial illegal search and seizure

¹ There was no substantive change to the sentence, just a technical change.

under the Fourth Amendment, as incorporated into the Fourteenth Amendment, to the United States Constitution.

- III. The State obtained Petitioner's conviction in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because of the State's racial bias.
- IV. A second detention of Petitioner, and the search and seizure of evidence from his vehicle, were illegal under the Fourth Amendment, as incorporated into the Fourteenth Amendment, to the United States Constitution.
- V. Petitioner was not advised of his *Miranda*² rights in violation of the Fifth and Sixth Amendments, as incorporated into the Fourteenth Amendment, to the United States Constitution.
- VI. Petitioner was not given a *Franks*³ hearing to challenge statements in the probable cause affidavit of the State's key witness, which supported the stop, search and seizure of Petitioner's vehicle, in violation of the Fourth Amendment, as incorporated into the Fourteenth Amendment, to the United States Constitution.
- VII. Petitioner requests an investigation by the Delaware Department of Justice Division of Civil Rights and Public Trust of the stop and search of his vehicle, and the appointment of a lawyer therefor, pursuant to 29 *Del. Code* §§ 2552 – 2553.

² 384 U.S. 436 (1966).

³ 438 U.S. 154 (1978).

IV. PROCEDURAL BARS UNDER RULE 61(i).

Before addressing the merits of the Rule 61 Motion, I first address the four procedural bars of Superior Court Criminal Rule 61(i).⁴ If a procedural bar exists, as a general rule I will not address the merits of the postconviction claim.⁵ Under the Delaware Superior Court Rules of Criminal Procedure, a motion for postconviction relief can be barred for time limitations, successive motions, failure to raise claims earlier in the proceedings, or former adjudication.⁶

First, a motion for postconviction relief exceeds time limitations if it is filed more than one year after the conviction becomes final.⁷ Since Petitioner filed his Rule 61 Motion within this one-year period, this bar does not apply.

Second, second or subsequent motions for postconviction relief are not permitted unless certain conditions are satisfied.⁸ Since this is Petitioner's first Rule 61 Motion, this bar does not apply.

Third, however, grounds for relief "not asserted in the proceedings leading to the judgment of conviction" are barred unless the movant can show "cause for relief"

⁴ *Ayers v. State*, 802 A.2d 278, 281 (Del.2002) (citing *Younger v. State*, 580 A.2d 552, 554 (Del. 1990)).

⁵ *Bradley v. State*, 135 A.3d 748 (Del 2016); *State v. Page*, 2009 WL 1141738, at*13 (Del. Super. April 28, 2009).

⁶ Super. Ct. Crim. R. 61(i).

⁷ Super. Ct. Crim. R. 61(i)(1).

⁸ Super. Ct. Crim. R. 61(i)(2).

and “prejudice from [the] violation.”⁹ In Grounds III (racial bias), IV (illegal search and seizure), V (failure to give *Miranda* warnings) and VI (failure to afford Petitioner a *Franks* hearing), Petitioner asserts grounds for relief not previously asserted in the proceedings. In order to overcome the procedural bar of Rule 61(i)(3), Petitioner must show (1) cause for relief from the procedural default, and (2) prejudice from the violation of his rights. A showing of cause is not satisfied by merely showing that a claim was not raised. Petitioner must show that “some external impediment” prevented him from raising the claim.¹⁰ To demonstrate prejudice, Petitioner must show that a “substantial likelihood” exists that if the issue had been raised on appeal, the outcome would have been different.¹¹ Petitioner makes neither showing in this case. Thus, Grounds III, IV, V and VI are deemed waived and are procedurally barred.

Fourth, grounds for relief formerly adjudicated in the case are barred.¹² Petitioner’s Ground II for relief is based on a claim of ineffective assistance of counsel. It is well-settled Delaware law that, as collateral claims, ineffective

⁹ Super. Ct. Crim. R. 61(i)(3).

¹⁰ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

¹¹ *Flamer v. State*, 585 A.2d 736, 748 (Del. 1990).

¹² Super. Ct. Crim. R. 61(i)(4).

assistance of counsel claims are properly raised for the first time in postconviction proceedings.¹³ Thus, this bar does not apply to Ground II.

Finally, the four procedural bars do not apply either to a claim that the Court lacked jurisdiction or to a claim that pleads with particularity that new evidence exists that creates a strong inference of actual innocence,¹⁴ or that a new retroactively applied rule of constitutional law renders the conviction invalid.¹⁵ Petitioner does not claim that he has new evidence that creates an inference of his actual innocence, or that a new retroactively applied rule of constitutional law renders his conviction invalid.

Thus, the procedural bars under Rule 61 apply to Grounds III, IV, V and VI in this case, and I will only consider Grounds I, II and VII on the merits.

V. Ground I – Full Record

Ground I is moot. In his first iteration of his Rule 61 Motion, Petitioner claimed that he had not been provided with a full record of all proceedings, including transcripts, videos and police reports. Subsequently Petitioner was provided all such materials, before the further iterations of his Rule 61 Motion.

¹³ *State v. Schofield*, 2019 WL 103862, at *2 (Del. Super. January 3, 2019); *Thelemarque v. State*, 2016 WL 556631, at *3 (Del. Feb. 11, 2016) (“[T]his Court will not review claims of ineffective assistance of counsel for the first time on direct appeal.”); *Watson v. State*, 2013 WL 5745708, at *2 (Del. Oct. 21, 2013) (“It is well-settled that this Court will not consider a claim of ineffective assistance that is raised for the first time in a direct appeal.”).

¹⁴ Super. Ct. Crim. R. 61(i)(5).

¹⁵ Super. Ct. Crim. R. 61(d)(2)(i) and (ii).

VI. Ground II – Ineffective Assistance of Counsel

Petitioner also claims that the assistance of both of his Trial Counsel was ineffective because of their failure to move to suppress evidence that was the result of an illegal search and seizure under the Fourth Amendment. Petitioner was originally represented by a Public Defender who filed a Motion to Suppress on November 14, 2018. A suppression hearing was scheduled for December 20, 2018, and witnesses were subpoenaed for that hearing. On December 14, 2018, however, another attorney was substituted as Trial Counsel, and the new Trial Counsel advised me by letter that he wished to adopt the earlier Motion to Suppress as his own and to proceed with the December 20, 2018 suppression hearing. However, in a conference in my office on December 20, 2018, Trial Counsel requested to postpone the suppression hearing pending a potential guilty plea. Indeed, Trial Counsel requested a control plea hearing of February 26, 2019, at which Petitioner pled guilty.

“In order to prevail on a claim of ineffective assistance of counsel in connection with a guilty plea, the defendant must demonstrate a reasonable probability that, but for his counsel's unprofessional errors, he would not have pleaded guilty but would have insisted on proceeding to trial.”¹⁶ Petitioner does not assert any grounds stating

¹⁶ *Foote v. State*, 38 A.3d 1254 (Del. 2012) (citing *Albury v. State*, 551 A.2d 53, 60 (Del. 1988)).

he was provided ineffective assistance of counsel in connection with his plea. Moreover, Petitioner does not argue the plea was not thoroughly discussed with counsel.¹⁷ Petitioner does not argue his plea was involuntary. Further, he does not contend that his counsel failed to provide him with the necessary information to enter a knowing plea. “A defendant's statements to the Court during a plea colloquy are presumed to be truthful, and pose a ‘formidable barrier in any subsequent collateral proceedings.’ ”¹⁸ It is well-settled that in the absence of clear and convincing evidence to the contrary, a defendant is bound by the statements made during the plea colloquy and by his representations on the Truth-in-Sentencing Guilty Plea Form.¹⁹ Defendant does not argue his plea was involuntary or untruthful. “When a defendant enters a guilty plea knowingly and voluntarily, he gives up his trial rights, including the right to challenge the evidence against him. Moreover, a knowing and voluntary guilty plea waives any objection to alleged errors and defects that occur before entry of the plea, even those of a constitutional dimension.”²⁰ Petitioner entered a knowing and voluntary plea; therefore, he waived any objections to alleged errors of evidence. In particular, he waived his

¹⁷ *Id.*, at *1 (“The transcript of Foote's guilty plea colloquy reflects that he confirmed that he thoroughly discussed his plea with his attorney and was satisfied with the advice he received. In the absence of clear and convincing evidence to the contrary, Foote is bound by those representations.”).

¹⁸ *State v. Rogers*, 2019 WL 2153312, at *2 (Del. Super. Ct. May 15, 2019) (citing *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997)).

¹⁹ *State v. Snell*, 2020 WL 5759141, at *2 (Del. Super. Ct. Sept. 28, 2020).

²⁰ *State v. Rogers*, *supra*, at *2.

right to attack Trial Counsel's strategic decision to forego the suppression hearing and enter a guilty plea.

VII. GROUND VII – STATUTORY INVESTIGATION

I am addressing this Ground separately because the statute which gives rise to it was enacted by the Delaware legislature on April 8, 2020, well after the proceedings in this case and after the Rule 61 Motion was filed.²¹ The statute added the Division of Civil Rights and Public Trust (the "Division") to the Delaware Department of Justice to investigate and enforce laws protecting the public trust and ensuring the protection of civil rights.²² The Division *shall* do all of the following:

- (1) Investigate and prosecute hate crimes under § 1304 of Title 11.
- (2) Investigate and prosecute civil or criminal misconduct committed under color of Delaware law or in the course of a public official's or state employee's duties.
- (3) Investigate all use of deadly force incidents by law enforcement for the purpose of determining whether such use of force was justified as a matter of law.
- (4) Enforce pattern and practice violations under Chapters 45 and 46 of Title 6.

²¹ This Ground was added on September 17, 2020 by Petitioner's Retracted/Amended Rule 61 Motion.

²² 29 Del. Code § 2552.

The Division *may* investigate, prosecute, and remediate a pattern or practice which violates any of the civil rights secured by the U.S. Constitution or Constitution of the State or Delaware law regarding any of the following:

- a. Public accommodations.
- b. Housing discrimination.
- c. Employment discrimination.
- d. Educational rights.
- e. Rights of individuals with disabilities.²³

There are at least two reasons why I will not address this Ground. First, none of the bases for investigation under this statute appears to be apposite in this case. Petitioner has not alleged criminal misconduct committed under color of Delaware law or in the course of a public official's or state employee's duties. Second, even if he had, I have no jurisdiction over such a claim. There is no enforcement mechanism under the statute for enforcement of the statute by Petitioner through an action in the Superior Court. Petitioner is, of course, free to request an investigation by the Division, and the appointment of counsel by the Division therefor, directly.²⁴

²³ 29 Del. Code § 2553.

²⁴ I note without addressing the issue that the legislative intent of the statute does not appear to be the creation of a new basis for collateral relief under Rule 61.

VIII. CONCLUSION

Since it plainly appears to me from the Rule 61 Motion and the record of prior proceedings in this case that Petitioner is not entitled to relief, I am entering an order for its summary dismissal²⁵ and causing Petitioner to be so notified. Given the clarity of the record, I am not ordering a response from the State,²⁶ an expansion of the record (including affidavits from Trial Counsel),²⁷ or an evidentiary hearing.²⁸

Petitioner Daniel Perez' Retracted and Amended Motion for Postconviction Relief is **DENIED**.

IT IS SO ORDERED.



Craig A. Karsnitz

cc: Prothonotary

FILED PROTHONOTARY
SUSSEX COUNTY
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²⁵ Super. Ct. Crim. R. 61(d)(5).

²⁶ Super. Ct. Crim. R. 61(f).

²⁷ Super. Ct. Crim. R. 61(g).

²⁸ Super. Ct. Crim. R. 61(h).